Immigration cases 2022—January to June review

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from January 2022 to June 2022 for immigration advisers, and explains why they are of interest. The review covers comprehensive sickness insurance, Appendix EU, Zambrano, Article 3 and Article 8 updates, paper appeals, citizenship reinstatement, deportation and asylum cases. It also looks at challenges to the 'no recourse to public funds' (NRPF) condition and the citizenship fees for children.

NRPF policy found to be unlawful, again

In *R (AB) v SSHD* [2022] EWHC 1524 (Admin) (20 June 2022), Lane J found the SSHD's guidance on lifting the 'no recourse to public funds' (NRPF) condition (contained in Family Policy: Family life (as a partner or parent), private life in exceptional circumstances—version 16.0) unlawful as it failed to reflect the SSHD's obligations under section 55 BCIA 2009 (duty regarding the welfare of children). This is the fifth time the SSHD's NRPF policy has been found to be unlawful. In *ST (a child, by his litigation friend) v SSHD* [2021] EWHC 1085 (Admin) (29 April 2021) the Divisional Court (Laing LJ & Lane J) held that the Immigration Rules, Appendix FM, para GEN.1.11A was unlawful, in that it did not refer to the best interests of the relevant child, but instead imposed a different, more stringent and narrower test based on 'particularly compelling reasons relating to the welfare of a child…'. Since the decision in *ST* the Supreme Court has given important guidance in, *R (A) v SSHD* [2021] UKSC 37 (30 July 2021) as to the correct test to be applied in determining if a policy is unlawful. The Supreme Court applied the more stringent test from *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 of whether the policy positively authorised or approved unlawful conduct by others. In *AB Lane J* found (para [60]):

> '...that in all cases where it would not be in the best interests of the child for the NRPF condition be maintained, the section 55 duty to make the child's interest a primary consideration is operative. The present words tell caseworkers (wrongly) that this is not the position.'

EEA EFM household members

Before the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 were revoked on 31 December 2020 there were a flurry of applications by extended family members (EFMs) of EEA nationals exercising Treaty rights in the UK. Since then the First-tier Tribunal (FTT) lists have been dominated by these appeals. In *Sohrab (continued household membership Pakistan* [2022] UKUT 157 (IAC), the UT gave guidance in respect of being a member of an EEA national's household. The tribunal states that there:

> '...must not be a break in dependence or household membership from the country of origin to the UK, other than a de minimis interruption.' In terms of the test to be applied to membership of an EEA national's household the Tribunal states that it, 'requires a sufficient degree of physical and relational proximity to the EEA national through living in the household of which the EEA national is the head, living together as a unit, with a common sense of belonging. There should be a genuine assumption of responsibility by the EEA national for the EFM. Questions of the commencement of the assumption of responsibility and the duration of dependency or household membership are relevant.'

The tribunal set out a number of relevant factors which should be considered when determining whether a person living away from the household is to be regarded as having left the household (paras [40]–[42]).

Refugee law: internal relocation and criminality

In *SC (Jamaica) v SSHD* [2022] UKSC 15 (15 June 2022), the Supreme Court considered the appeal of a Jamaican national who was subject of a deportation order. *SC* is at a real risk of treatment contrary to Article 3 ECHR in urban but not rural parts of Jamaica. *SC's* deportation to Jamaica by the SSHD would be unlawful unless *SC* 'can reasonably be expected to stay' in the rural areas of Jamaica. The Court of Appeal had set aside the decision of the FTT allowing SC's appeal. The first

issue was whether *SC's* criminal conduct is a factor relevant to determining if he could reasonably be expected to stay in a rural area of Jamaica, based on a value judgment of what is 'due' to him as a criminal. In allowing his appeal the Supreme Court found that the correct approach to the question of internal relocation is a holistic assessment involving specific reference to the individual's personal circumstances, including past persecution, psychological and health conditions, family and social situation and survival capacities. It should not take into account what is 'due' to the person as a criminal (paras [95]–[97]). Lord Stephens went on to find that the FTT judge had not erred in her assessment of internal relocation; in her assessment of sections 117C(4)(b)–(c) of the Nationality, Immigration and Asylum Act 2003 in respect of her finding that *SC* is socially and culturally integrated in the UK and there would be very significant obstacles to his integration in Jamaica; and in her assessment of Article 8. The Supreme Court restored the decision of the FTT judge allowing the appeal.

Legal limbo & Article 8

In *R (AM) v SSHD* [2022] EWCA Civ 780 (10 June 2022) the Court of Appeal considered the issue of the circumstances in which an individual, who is in a state referred to in the authorities of being in 'limbo', may be entitled to some form of immigration status pending their removal. Previous decisions have described 'limbo' as being a state where the individual has no leave to remain in the UK, but there is no current prospect of the individual being deported from the UK because there is no realistic prospect of removal within a reasonable time (para [6]). The SSHD challenged the decision of the President of the UT in *R (AM) v SSHD (legal 'limbo')* [2021] UKUT 62 (IAC) (1 February 2021) in which the UT had declared that the SSHD's refusal to grant leave to remain infringed AM's Article 8 rights. The SSHD challenged the UT's decision on four grounds: first that its declaration that the refusal to grant leave was a disproportionate interference with AM's article 8 rights was inconsistent with case law from the ECtHR; secondly that when considering the effect of a grant on immigration control, the UT wrongly focused on the benefits to AM of his time in the UK, rather than the impact of a grant in this case on other recalcitrant illegal entrants; thirdly the UT wrongly applied a 'near miss principle' by taking into account, as a material factor in his favour, the fact that AM 'nearly' met the requirements of the Immigration Rules, Part 7, para 276ADE because he had spent twenty years in the UK, and the UT was wrong to treat this as an 'important yardstick'; and fourthly the UT failed to give due weight to the SSHD's assessment of the consequences, to other cases, of granting leave to remain in this case. The Court of Appeal dismissed the SSHD's appeal. Dingemans LJ summarises the law in relation to limbo (paras [6]–[14]). It was common ground in the appeal (para [59]) that the correct approach to Article 8 in 'limbo' cases is that set out by Haddon-Cave LJ in *RA (Iraq) v SSHD* [2019] EWCA Civ 850, therefore the question for the court was whether the decision of the UT was wrong (para [62]). Dingemans LJ rejected the SSHD's specific challenges and concluded (para [74]):

> 'This was a judgment by the judges in the UTIAC who had correctly directed themselves on the law by reference to RA (Iraq). The judges had regard to public interest in the maintenance of effective immigration controls, as set out in section 117B of the 2002 National Act. The judges had full regard to AM's own responsibility for his very long period of limbo and his criminal convictions and the public interest in his removal, but the judges also recognised AM's vulnerabilities, that the prospect of removal of AM was remote, and had been remote for a considerable period. The judges considered carefully the factors supporting the grant of some form of leave and the public interest in deterrence. The experienced judges considered that in "the very compelling circumstances" of AM's case, the important principles of deterrence would not be undermined, and that the declaration made was appropriate.'

It should be noted that the declaration made by the UT 'will not prevent AM's future removal, if circumstances change' (para [75]).

Afghan applications: Afghan judges, LOTR, forms & biometrics

In *R (S) v Secretary of State for Foreign, Commonwealth and Development Affairs, R (AZ) v SSHD* [2022] EWHC 1402 (Admin) (09 June 2022) Lang J considered judicial review applications by a number of claimants, who were judges in Afghanistan prior to the defeat of the Afghanistan government by the Taliban in August 2021. It was not in dispute that the claimants are at risk of serious harm or death at the hands of the Taliban. The SSHD refused their applications under the Afghan Relocation and Assistance Policy (ARAP) and refused to make a decision on the claimants' applications for Leave Outside the Rules (LOTR) in the absence of an application form and a decision to waive or defer biometrics. Lang J rejected the challenge based on the treatment of comparator judges who were relocated to the UK, during and after Operation Pitting, under ARAP or under a

grant of LOTR. However Lang J found that the claimants' challenge of the SSHD's refusal to consider their LOTR applications on procedural grounds succeeded. Lang J said (para [133]):

> 'In my judgment, the Defendants' justification is irrational. ARAP is in the IR, so it cannot sensibly be said that it is not an immigration policy. While it may be inconvenient for the MoD officials to have to refer LOTR applications on to the Home Office for consideration, I consider it is irrational and disproportionate for the Defendants to prioritise their own administrative convenience in this way when it is acknowledged that the Claimants are at risk of serious harm at the hands of the Taliban.'

Lang J noted with concern that the revised LOTR policy which came into effect on 9 March 2022, after the decisions were made in the claimants' cases, expressly excludes applications for LOTR using the ARAP online form (para [134]). Lang J holds (para [137]) that the:

> '...rational and fair course of action was for the SSHD to amend the online form so as to include the option of applying for a waiver/deferral of biometrics testing. The SSHD has now done this, but only after the decisions in the Claimants' cases were made.'

Zambrano cases: the last resort

In *Akinsanya v SSHD* [2022] EWCA Civ 37 (25 January 2022) the SSHD appealed against the decision of Mostyn J who held that a *Zambrano* right in EU law was not extinguished by the existence of a concurrent limited leave to remain and that even if the jurisprudence of the Court of Justice did not go that far, the domestic formulation of the *Zambrano* right in Immigration (European Economic Area) Regulations 2016 (EEA Regs 2016), SI 2016/1052, reg 16 was quite clearly to the effect that the right conferred by paragraph (5) was only excluded where the carer enjoyed indefinite leave to remain, since paragraph (7) refers only to ILR. Mostyn J therefore declared that the SSHD erred in law when providing, in the Immigration Rules, Appendix EU, Annex 1, that the definition of a 'person with a Zambrano right to reside' includes paragraph (b) 'a person...without leave to enter or remain in the UK, unless this was granted under this Appendix'. The Court of Appeal dismissed the SSHD's appeal on the basis that Regulation 16(7)(c)(iv) is simply too clear to allow it to be construed as covering persons with limited leave to remain. However on the issue of the *Zambrano* right in EU law the Court of Appeal found, relying on *Iida v Stadt Ulm* Case C-40/11 and *NA v SSHD* Case C-115/15, that it only arises in circumstances where the carer has no domestic (or other EU) right to reside (para [55]). Underhill LJ distinguishes the observations of Elias LJ in *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49. However Underhill LJ said (para [57]):

> 'Notwithstanding the analysis above, the fact remains that if at any time a Zambrano carer loses their right to reside as a matter of domestic law, the Zambrano right will arise (assuming, that is, that the effect of the carer leaving will be that the EU citizen child also has to do so): Zambrano is always waiting in the wings, and so long as the Zambrano circumstances obtain the carer can never be put in a position where their residence is unlawful.'

As a result of this judgment the SSHD published new guidance on 13 June 2022 'EU Settlement Scheme: Zambrano primary carers' which states:

> 'The Home Secretary has carefully considered the Court of Appeal judgment and has decided that she no longer wishes that definition in Appendix EU to reflect the scope of the 2016 Regulations (which have now been revoked) but wishes it to reflect the scope of those who, by the end of the transition period, had an EU law right to reside in the UK as a Zambrano primary carer, in line with the originally stated policy intention. She therefore intends to maintain the requirement in sub-paragraph (b) of the definition that the applicant did not, by the end of the transition period and during the relevant period relied upon, have leave to enter or remain in the UK (unless this was under the EUSS).'

The Court of Appeal on Zambrano & Regulation 16(5)(c)

In *Velaj v SSHD* [2022] EWCA Civ 767 the Court of Appeal considered the correct interpretation of EEA Regs 2016, SI 2016/1052, reg 16(5)(c). The EEA Regs 2016 ceased to have effect, save for certain transitional purposes, on 31 December 2020.

The issue in *Velaj* was whether a decision maker must consider whether the British citizen dependant would be unable to reside in the UK on the assumption that the primary carer will leave the UK for an indefinite period (irrespective of whether the assumption is correct); or whether the decision-maker must consider what the impact on the British citizen would be if in fact the primary carer (or both primary carers) would leave the UK for an indefinite period (para [13]). The appellant argued, relying

upon *R (Akinsanya) v SSHD* [2022] EWCA Civ 37, that Regulation 16(5)(c) required the decision maker to answer a hypothetical question and removed the any factual enquiry of whether the primary carer would in reality have to leave the UK (para [36]). Andrews LJ (who was also on the panel in *Akinsanya*) said (para [47]):

> 'I do not accept that Regulation 16(5)(c), as modified by Regulation 16(8) and (9), admits of only one interpretation. Nor do I accept that the construction contended for by Mr Cox is the natural and obvious one. The focus is on whether the British Citizen dependant would be "unable" to remain in the UK "if" something happens—ie on what will happen to the child if the primary carer leaves (or both primary carers leave). In that context the word "if" requires the decision maker to consider the position of the child on the basis that something is (actually) going to happen. It does not require that premise to be purely hypothetical, let alone counterfactual. Given that the person asking themselves the question has to decide what in practice would happen to the child if that event occurred, it would make little sense to require them to make an assumption that the event will happen if it plainly will not.'

Andrews LJ went on (para [49]) to agree with the UT that what is required is, 'a nuanced analysis of inability, and not a simple analysis of a hypothetical question, and that must mean that the decision-maker is looking at what is likely to happen in reality'.

Andrews LJ then considered *Akinsanya* (paras [53]–[70]) and found that there was nothing in the judgment which precluded the interpretation of Regulation 16(5)(c) which she had adopted.

ETS TOEIC cases

The latest instalment in the ongoing 'ETS TOEIC' saga (which relate to whether individuals cheated on their Test of English for International Communication (TOEIC), identified by Educational Testing Services (ETS)), came with the decision of in *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) (25 March 2022). The tribunal consider the question of legal and evidential burdens and the decision of the former President, McCloskey J, in *Muhandiramge v SSHD* [2015] UKUT 675 (IAC). In respect of *Muhandiramge* the tribunal find that the approach, to the burden of proof, set out therein was wrong. Ockelton VP says (para [47]):

> 'As a statement of either the procedure at an appeal or the law, however, it is wrong. There is no sense in which procedurally a case passes backwards and forwards between the parties, giving either of them new chances or even tactical obligations to meet the evidence so far adduced by their opponent: on the contrary, each side has one opportunity only to produce all the evidence it considers relevant to the case. Further, the burden of proof does not shift from one side to the other during the course of a trial. The burden of proof is fixed by law according to the issue under examination. If it were not so, parties would not know in advance what evidence would or might be necessary to establish their cases.'

In terms of the standard of proof, on the SSHD, to prove dishonesty the test is the balance of probabilities and there is no requirement to offer 'cogent' evidence. Ockelton VP says (para [60]):

> 'We therefore ask first whether the Secretary of State's evidence would enable a properly-instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. If the evidence at this point would not support a finding that the matter was proved on the balance of probabilities, the appellants would be entitled to succeed in their appeals. If, however, it would support such a finding, the evidence as a whole falls for consideration in order to decide whether the appeals succeed or fail. With that in mind, we turn to the evidence before us.'

In terms of the general ETS evidence now being relied upon by the SSHD the tribunal finds that it is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy. The tribunal dismissed the appeal before them.

The Court of Appeal recently upheld the decision in *DK and RK* in *SSHD v Akter* [2022] EWCA Civ 741 (27 May 2022). In *Akter* Macur LJ said (para [29]):

> 'The judgment in DK and RK (2) includes a comprehensive account of the evidence which the UT heard and its analysis of the same and upon which it based its decision. That is, the UT in DK and RK (2) demonstrably undertook the forensic examination and reached the definitive conclusions that were not open to Dove J upon the evidence before him in Alam. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to revisit and overturn the determination. This is not a situation, as Mr Wilcox suggested on behalf of HA, in which different Tribunals could reasonably reach different conclusions upon the same factual matrix.'

Practitioners will need therefore to address the issues as set out in *DK* and *RK* in ETS appeals.

Article 3 cases and expert mental health evidence in appeals

In *AM (Article 3, health cases) Zimbabwe* [2022] UKUT 131 (IAC) (22 March 2022), which was the remitted hearing from the Supreme Court in *AM (Zimbabwe) v SSHD* [2020] UKSC 17, the UT set out the correct approach in Article 3 health cases following the decision of the Supreme Court and of the ECtHR in *Savran v Denmark* (application no. 57467/15). The correct test to be applied is that set out (para [183]) of *Paposhvili v Belgium* [2017] ECHR 41738/10 and the UT summarise the questions which must be answered by decision makers (paras [21]–[28]). The UT state that (para [28]):

> 'It is only after the threshold test has been met and thus Article 3 is applicable that the returning state's obligations listed in [187–191] of Paposhvili and summarised at [130] of Savran become of relevance—see [135] of Savran.'

Practitioners should address the questions set out by the UT in their appeal skeleton arguments cross referencing the medical and country evidence which show that the test is made out. Ultimately the UT concluded that Article 3 would not be breached if *AM* was returned to Zimbabwe (para [134]).

In *HA (expert evidence, mental health) Sri Lanka* [2022] UKUT 111 (IAC) (25 March 2022) the UT gave guidance in respect of expert reports; in particular, psychiatric reports. This judgment is important for practitioners who instruct experts especially psychiatrists and should be referred to in letters of instruction. In *HA* there were psychiatric reports from both Dr Raj Persaud and Professor Greenburg. The UT were critical of the reports of Dr Persaud in a number of respects, the President states (para [118]):

> 'Bearing in mind the serious and important obligations owed by an expert witness to the court or tribunal in which he or she is giving evidence, there can be no question that Dr Persaud failed to give an even-handed account of his history as a psychiatrist. On the contrary, by failing to disclose the fact that he had been suspended from practice for bringing the profession into dispute as a result of his plagiaristic activities, Dr Persaud's reports are misleading. The impression given by the reports is that he has an unblemished record as an internationally-renowned public face of psychiatry, not just a skilled clinician.'

The President also states that Dr Persaud had, in reality, assumed the role of advocate for the appellant (para [148]). The tribunal give some general observations concerning psychiatric and other mental health expert reports (paras [157] to [165]). These general observations form the basis of the head note and should be followed. Of particular note is the tribunal's emphasis on the importance of GP records and the need for the tribunal to be scrupulous in ensuring that an expert has complied with their professional obligations. The President says (para [159]):

> 'In the case of human rights and protection appeals, however, it would be naive to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the respondent's attempts at removal.'

The tribunal states that in the future greater use may be made of joint expert reports (para [166]). The tribunal also summarise the law on mental health and suicide risk (paras [167]–[183]). In terms of Article 8 the tribunal says (para [182]):

> 'So far as concerns Article 8, the Court of Appeal has recently reiterated that Article 8 is not in this contest to be regarded merely as Article 3 with a lower threshold: SL (St Lucia) v SSHD [2018] EWCA Civ 1894. An appellant cannot succeed under Article 8 simply because of their mental ill-health and suicide risk, if those are insufficient and meet the high Article 3 test set by *Paposhvili* and (now) explained by Savran.' Although at [183] the Tribunal acknowledge that, 'Mental ill-health and suicide risk may, however, be combined with other Article 8 factors, so as to create a cumulative case, which enables an appellant to succeed on Article 8(2) proportionality grounds.'

The tribunal dismissed HA's appeal.

Bye bye CSI

Under EU law an individual relying on the right to reside as a student or a self-sufficient person was required to have comprehensive sickness insurance (CSI) for themselves and any family members. Over many years there has been debate and dispute as to whether access to NHS treatment discharged the CSI requirement. Finally on 10 March 2022 the Court of Justice in *VI v Commissioners for Her Commissioners for Her Majesty's Revenue and Customs* Case C-247/20 ruled that (para [69]):

> '...once a Union citizen is affiliated to such a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b).'

The previous approach of the Home Office and of the courts and tribunals in the UK, in finding that access to NHS treatment did not count as CSI, has denied huge numbers of people the right to benefits, the right of residence and has led to people being removed from the UK. A campaign has now been set up seeking justice for those who were adversely affected by this unlawful requirement at https://www.csi-justice.org.uk.

Indemnity costs in UT judicial review

In *R (Butt) v SSHD (Indemnity costs)* [2022] UKUT 69 (IAC) (4 February 2022) the UT considered the basis upon which the SSHD should pay costs where she had agreed to pay the claimant's reasonable costs. The claimant applied for entry clearance as a Tier 1 (Entrepreneur) and his case has led to six sets of judicial review proceedings. The UT held that while no mention of the basis of costs assessment is made in the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) or the Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698, the distinction drawn between the standard and indemnity bases by CPR 44.3(1) can properly inform the exercise of discretion by the UT when exercising its full power to determine the extent costs are to be paid under TCEA 2007, s 29. The distinction between the standard and indemnity bases are well-known and well-understood across the civil justice system and applied in judicial review proceedings that take place in the High Court and beyond. There is no reason not to employ it in the UT. Due to the SSHD's failure to comply with the exceptionally firm terms of the consent order in the fifth judicial review proceedings, which was more than the usual compromise in public law proceedings, the claimant initiated the sixth set of proceedings. The tribunal found that (para [57]):

> 'Such conduct takes this case out of the norm, and we find in the circumstances that the applicant should be awarded his costs in these proceedings on an indemnity basis.'

NRM claims and discretionary leave

The Court of Appeal considered two appeals by the SSHD in *EOG & KTT v SSHD* [2022] EWCA Civ 307 (17 March 2022). In *EOG v SSDHD* [2020] EWHC 3310 (Admin) (03 December 2020) Mostyn J upheld the complaint that SSHD's National Referral Mechanism (NRM) policy does not provide for the grant of leave to remain to potential victims of trafficking who have a positive reasonable grounds decision but are waiting for a conclusive grounds decision. In *R (KTT) v SSHD* [2021] EWHC 2722 (Admin) (12 October 2021) Linden J upheld the complaint that the SSHD's policy should have provided for the grant of leave to remain pending a decision on the claimant's asylum claim where she had received a positive conclusive grounds decision but had a pending asylum claim on the basis that she feared being re-trafficked upon return to her home country. Underhill LJ considered the preliminary issue of justiciability given that the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) has not been incorporated in domestic legislation. However before the court the SSHD conceded that (para [33]):

> 'if in the relevant respects the policy of the Secretary of State was that the Guidance should comply with ECAT it was open to the Court to decide whether it in fact did so and to hold that it was unlawful if it did not.'

In any event Underhill LJ said that he entirely agreed with Linden J's analysis on this issue (para [34]). In *EOG* Underhill LJ disagreed with Mostyn J and found that art 10(2) of ECAT did not require the state to grant any kind of immigration status (beyond irremovability) to potential victims (para [46]). However Underhill LJ agreed with the decision of Linden J in *KTT* and determined the issues in *KTT's* favour. *KTT's* case is set out at para [78]:

> 'KTT's case can be straightforwardly stated. The question which the Secretary of State is required by article 14.1 (a) to consider is whether "[the victim's] stay is necessary owing to their personal situation". Mr Buttler accepts that that language has to be construed having regard to the purpose of chapter III, which was characterised by Hickinbottom LJ in PK (Ghana) (see para. 50) as "the protection and assistance of victims of trafficking"; and that accordingly the reference must be to the victim's situation as a victim of trafficking; but he submits that it is clear as a matter of language that it is the stay, not the issue of the residence permit, which must be "necessary". He says that KTT's asylum claim related to her situation as a victim of trafficking because it was based on the risk of her being re-trafficked if she were returned to Vietnam, and it was

> necessary for her to stay in the UK in order to pursue that claim. He says that that conclusion plainly conforms to the purposes of ECAT because it means that a victim of trafficking awaiting the outcome of a (trafficking-related) asylum claim will not be in the limbo described at para. 40 above, with no immigration status and unable to work.'

Underhill LJ therefore allowed the SSHD's appeal in *EOG* but dismissed it in *KTT*. Underhill LJ adds a concluding observation in respect of the significant delays in the SSHD reaching conclusive grounds decisions and also that there are very long delays in the asylum system (para [91]).

Upper Tribunal error of law decision on the papers

In *Joint Council for the Welfare of Immigrants (JCWI) v President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin) Fordham J found that the guidance note issued by the President of the UT on 23 March 2020 was unlawful as it gave advice which was wrong in law and which would tend to encourage unlawful decisions about when to determine appeals on paper. Following the *JCWI* decision some appellants made applications under Rule 43 of the Upper Tribunal Rules to set aside the paper determinations which had been determined against them by the UT. In *EP (Albania) (rule 34 decisions, setting aside)* [2021] UKUT 233 (IAC) the UT considered 18 of those Rule 43 applications and held that a decision to determine the appeal on the papers would be unlawful if there had been a failure to act fairly and there would be a need to consider whether the (para [69]):

> '...reasons whether expressly or by inference point to a conclusion reached without consideration of the principles that make up the overriding objective, or without consideration of whether determination of the error of law appeal without a hearing would be consistent with the principles of fairness…'.

In *Hussain & GA (Ethiopia) v SSHD* [2022] EWCA Civ 145 (11 February 2022) the Court of Appeal considered these issues further. The SSHD had indicated in a late amended respondent's notice that she submitted that *JCWI* was wrongly decided (para [11]) however in the end it was not necessary for the Court of Appeal to determine this issue (paras [14]–[17]). The issue then before the court was whether the paper decisions were in fact fair (para [18]). Dingemans LJ agreed (para [19]) that the UT was right in *EP (Albania)* to:

> '...reject the submission that, as a result of the judgment in JCWI v President of UTIAC, the determinations on paper made by UTIAC after the guidance note had been produced, should be set aside. This is because the question is whether it was fair to determine the matter on the papers.'

In both appeals the court found that the paper determinations did not satisfy the requirements of common law fairness and submissions had been overlooked and in *GA's* case the appellant was not given an opportunity to address the concerns as to whether a Country Guidance decision should be followed. Both appeals were therefore allowed and remitted to the UT.

Citizenship fees for children

In *R (O) (a minor, by her litigation friend AO))v SSHD* [2022] UKSC 3 the Supreme Court dismissed an ultra vires challenge to subordinate legislation which set the fee at which a child or young person could apply to be registered as a British citizen at a level which many young applicants have found to be unaffordable (£973 at that time and £1,012 since 6 April 2018). Lord Hodge held that statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered (para [31]). Applying those principles, Lord Hodge concluded that, in the Immigration Act 2014, Parliament authorised the subordinate legislation by which the SSHD has fixed the relevant application fee (para [51]). The appropriateness of imposing the fee on children is a question of policy which is for political determination, and not a matter for the court. The appeal was therefore dismissed (para [52]). However the SSHD had lost in the Administrative Court and Court of Appeal on section 55 BCIAA 2009 grounds which were not before the Supreme Court and led to the SSHD introducing a new 'Affordability fee waiver: Citizenship registration for individuals under the age of 18' caseworker guidance.

Deprivation of citizenship: the effect of reinstatement

In *E3 v SSHD* [2022] EWHC 1133 (Admin) (13 May 2022) Jay J considered the claims of a number of individuals who had been deprived of their citizenship, but subsequently the SSHD had reinstated it. The question before the court was framed as follows (para [2]):

> 'Was the legal effect of the Defendant's withdrawal decision prospective only (the Defendant's analysis) or was it retroactive in the sense that it should be treated as never having been made (E3's and N3's analysis)?'

The question was not merely academic as the claimant *ZA* was E3's daughter and had been born during the period of deprivation and therefore there was a question as to whether she was automatically British by birth. Jay J held that against the claimants' contention finding that the statutory scheme does not compel withdrawal with retrospective effect (para [101]). Jay J stated (para [102]):

> 'In the alternative, and if pressed, I would hold that retrospective withdrawal (whether at the Defendant's instance or following an adverse decision by SIAC in the particular case) should be reserved for situations where perversity, unfairness or bad faith has been found.'